80-2188 No.

Office-Supreme Court, U.S.
JUN 24 1981
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term 1980

FRIARTON ESTATES CORP., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Richard Ayres Givens
Botein, Hays, Sklar & Herzberg
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

Roger F. Bloom
Gina Schachter
Botein, Hays, Sklar & Herzberg
Of Counsel for Petitioners

Question Presented for Review

Is it a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for the City of New York to confiscate petitioners' real properties pursuant to summary judgment of *in rem* foreclosure for alleged nonpayment of real estate taxes where:

(a) The Courts of New York State refused to consider petitioners' defenses, supported by substantial evidence, that the taxes assessed are invalid and unconstitutionally confiscatory in that they are based on assessed valuations

(i) which are large multiples of the properties' fair market value and greatly in excess of the properties' ability to generate sufficient income to pay such taxes;

(ii) which failed to take into account large operating losses sustained by the properties for seven to ten years, caused by the combination of rigid New York City rent controls and extensive services required by the City and State of New York upon pain of substantial criminal and civil liability; and

(iii) which are grossly disproportionate when compared to the assessed valuations of other properties located in the City of New York, in violation of State law and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;

(b) By a variety of procedural delays, the City of New York has blocked trial of tax certiorari proceedings (the only legal method available to petitioners for the purpose of obtaining reductions in the assessed

valuations of their properties), thus enabling the City to summarily foreclose on tax liens and acquire the properties without compensation; and

(c) The State Courts' reason for refusing to consider petitioners' defenses was that petitioners had failed to prepay allegedly conceded amounts, although

(i) prepayment of the substantial amounts claimed would not assure petitioners a trial on the merits of their constitutional and State law defenses within any foreseeable or reasonable time thereafter;

(ii) prepayment on the City's terms would require that petitioners waive substantial rights; and

(iii) the prepayment proposal was presented at the last minute in a so-called "settlement offer" while the City's motion for summary judgment was pending?

Parties to the Proceeding in the Court of Appeals of the State of New York

Petitioners Friarton Estates Corp., Brontel, Ltd., West Paterson 46 Corp., Rent Control Memorial Corp., BWIT Fifty-Fifty Street, Inc., and Mid-Central Properties, Ltd. are all parties to the proceeding in the Court of Appeals of the State of New York, whose order is sought to be reviewed. The other parties to the proceeding in the Court of Appeals are respondents, the City of New York, the Tax Commission and the Finance Administrator of the City of New York.*

* Petitioners are privately held corporations that have no parent companies, subsidiaries or affiliates, except that Friarton Estates Corp., Brontel, Ltd., West Paterson 46 Corp. and Rent Control Memorial Corp. may be deemed to be affiliates of each other, and BWIT Fifty-Fifth Street, Inc. is a wholly owned subsidiary of American Pacific Corp.

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No.

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October Term 1980

FRIARTON ESTATES CORP., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered in this proceeding on March 26, 1981, which dismissed petitioners' appeal as of right from a judgment confiscating their properties on the ground that "no substantial constitutional question is directly involved."

Opinions Below

The order of the Court of Appeals entered on March 26, 1981 was without opinion, as was the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on December 18, 1980, affirming the orders and the judgments below. The orders of the Supreme Court of the State of New York, County of New York, entered on August 31, 1979, granting summary judgment of foreclosure against petitioners' properties in favor of the City of New York were accompanied by a memorandum decision which is unofficially reported at *Matter of Foreclosure Action No. 29,* New York Law Journal, September 6, 1979, p. 4, col. 1, and reproduced in the Appendix (20a). The decision and order of the Supreme Court, New York County, denying petitioners' motion for a rehearing, filed January 3, 1980, is not reported. It is reproduced in the Appendix (25a).

Jurisdiction

The order of the Court of Appeals of the State of New York dismissing petitioners' appeal was entered on March 26, 1981. This petition was timely filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Constitution of the United States, Fourteenth Amendment.

Section 1.

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Administrative Code of the City of New York.

> § D17-4.0 *Foreclosure by action in rem.*—a. Whenever it shall appear that a tax lien has been due and unpaid for a period of at least one year from the date on which the tax, assessment or other legal charge represented thereby became a lien, such tax lien except as provided in subdivision (b) of this section or otherwise provided by this title, may be summarily foreclosed in the manner provided in this title, notwithstanding the provisions of any general, special or local law and notwithstanding any omission to hold a tax sale prior to such foreclosure.
>
> * * *
>
> § D17-11.0 *Presumption of validity.*—It shall not be necessary for the city to plead or prove the various steps, procedures and notices for the assessment and levy of the taxes, assessments or other lawful charges against the parcels set forth in the list of delinquent taxes and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. A defendant alleging any jurisdictional defect or invalidity in such taxes, assessments or other lawful charges or in the foreclosure thereof must particularly specify in his answer such jurisdictional defect or invalidity and must affirmatively establish such defense. . . .

§ 166-1.0 *Proceeding to review tax assessment; contents of petition.*—a. Any person or corporation claiming to be aggrieved by the assessed valuation of real property may commence a proceeding to review or correct on the merits a final determination of the tax commission. . . .

b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

1. That the assessment is illegal, and stating the particulars of the alleged illegality, or

2. That the assessment is erroneous by reason of over-valuation, or

3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby.

Statement of the Case

Petitioners are the owners, former owners and mortgagees of certain real properties (hereinafter "the properties") located in the City of New York. On July 6, 1977, the City of New York (the "City") commenced *In Rem* Tax Foreclosure Action No. 29 (New York County, Borough of Manhattan), seeking to take complete title to the properties because of alleged delinquencies in payment of real estate taxes. On August 31, 1979, the Supreme Court, New York County, granted summary judgment of foreclosure against the properties (5a, 20a)* and on May 20, 1980, amended supplemental judgments of foreclosure were entered (6a), among other things, directing transfer to the City of title to and possession of the properties.

The orders and judgments of foreclosure were granted to the City without any adjudication of the merits of petitioners' defenses that the taxes assessed are invalid and unconstitutionally confiscatory because they are based on assessed valuations:

(a) far in excess of fair market value (R 353, 533)** as shown by arms-length sales of the properties involved (R 478-479, 531) in violation of the New York State Constitution, Article XVI, § 2, and New York Real Property Tax Law § 306;

(b) so grossly disproportionate when compared to the assessed valuation of other real properties in New

* Page references to the Appendix are in the form "——a."

** Page references to the Record on Appeal before the Appellate Division, First Department, are in the form "R ——."

York City as to deny petitioners equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R 105, 273-274, 352-353, 447); and

(c) arbitrarily fixed without regard to consistently large operating losses (R 308-315) sustained for seven to ten years as a result of:

(i) rigid City-mandated limitations on the rents that tenants can be charged pursuant to the New York City Rent and Rehabilitation (rent control) Law, which has been virtually unyielding since 1943 when it was originally instituted as an emergency wartime measure, and the more recently enacted (1969) Rent Stabilization Law (Admin. Code of the City of New York §§ Y51-1.0–Y51-18.0; City Rent and Eviction Regulations § 21; Admin. Code §§ YY51-1.0–YY51-7.0; Rent Stabilization Code § 20) (petitioner Friarton's tenants pay rents as low as $49.87, $59.40 and $62.08 per apartment per month [R 516]);

(ii) City-mandated requirements under the rent control law that owners provide ever-increasing "essential" services upon pain of substantial criminal and civil liability (City Rent and Eviction Regulations § 22; Admin. Code §§ Y51-11.0; D26-51.01 and 52.01); and

(iii) the new demands of the warranty of habitability imposed on all residential leases in New York by Real Property Law § 235-b (R 237-238, 323-324, 355, 463, 595, 601-603, 607), and numerous other restrictions (41a).

The judgments of foreclosure were also granted in spite of petitioners' contentions that they had not been afforded a trial on the merits of the assessed valuations of the properties because of a variety of procedural obstacles created by the City which virtually eliminated tax certiorari trials in New York County in cases in which inequality of assessment is claimed (R 73, 106-107, 239, 325, 353, 387, 448, 531, 533). Specifically, beginning in 1973 through the present, petitioners commenced tax certiorari proceedings pursuant to Section 166-1.0 of the Administrative Code of the City of New York (R 73, 106-107, 239, 325, 353, 447, 461) for the tax years 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81 and 1981-82 seeking reductions of the assessed valuations of the properties on the statutory grounds of (a) "over-valuation" and (b) "inequality". Petitioners claimed that the assessed valuations were fixed by the City in desregard of large operating losses incurred by the owners in carrying out their obligation to provide services required by City and State law. These substantial and continuing losses (R 308-315) make it impossible to pay the taxes imposed by the City out of revenues from the properties as limited by the City's rent control and rent stabilization restrictions (R 108, 131, 319; see also 41a).

Both prior to and after the commencement of *In Rem* Action No. 29, petitioners made every reasonable effort to obtain a tax certiorari trial. They assembled complex financial data required by the City as a condition to filing notes of issue, filed such notes of issue two years ago (R 540-541), and repeatedly and continuously requested immediate trial (R 130, 157, 611). They moved for trial preferences in the tax certiorari proceedings (R 102, 525) and for consolidation of the proceedings with *In Rem*

Action No. 29 (R 264-265). The motions were denied by orders entered on January 3, 1980 (25a) and May 20, 1980, respectively (6a).

Despite petitioners' efforts to obtain a day in Court to present evidence on the merits of their defenses, the City has been successful in preventing petitioners' tax certiorari cases from coming to trial. It has done so by means of the following pattern of conduct:

(a) Since approximately 1974, permitting virtually no trials of tax certiorari cases in New York County where inequality is claimed (R 448);

(b) Relegating all cases in which inequality of assessment is claimed to a separate "inequality calendar" without publishing any rules, guidelines or dates for trial (Respondent-Appellants' [petitioners'] Brief before Appellate Division, pp. 25-26; Respondents-Appellants' [petitioners'] Jurisdictional Statement before the Court of Appeals, pp. 8-9); and

(c) Resorting to numerous other deliberate delaying tactics such as not assigning City attorneys to these cases (R 531), refusing to hold settlement conferences required under the so-called "eight-month hearing" rule which was a legal precondition to proceeding to trial (R 610), and refusing to agree to trials—all with the effect, conceded by the City in the State Court proceedings of delaying certiorari trials "indefinitely" (27a).

Developments subsequent to the orders and judgments of the Supreme Court, New York County, have confirmed this pattern of obstruction. After oral argument on peti-

tioners' appeal to the Appellate Division, First Department, and prior to entry of the Appellate Division's order affirming the orders and judgments of foreclosure, the City applied for and obtained, in a proceeding entirely separate from those instituted by petitioners and in which they were not parties and not in any way represented, a Court-ordered stay of all cases on the entire "inequality calendar," without affording petitioners either notice or an opportunity to be heard (*Freewalt Realty Corp.* v. *Finance Administrator and Tax Commissioners,* N.Y.L.J. [Sup. Ct. N.Y. Co.], December 5, 1980, p. 6) (27a).

The Supreme Court, New York County, refused to consider petitioners' defenses that the taxes assessed were invalid and unconstitutionally confiscatory and hence that *in rem* foreclosure, in light of the unavailability of tax certiorari trials, constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. It did so on the ground that there had been "a default in the payments of the amount of taxes admitted by defendants to have been properly due" (23a). The Court further held that the procedural due process questions raised by petitioners had "been mooted by [their] failure to pay even those taxes which would have been due had the valuation been what [they] had claimed" (26a).

In fact, petitioners never conceded any net amounts were due the City (R 70, 103-104, 236, 322, 350).* Even if

* In an argument never adopted or referred to by the Supreme Court, New York County, or by the State Courts on appeal, the City also claimed on appeal that foreclosure was justified on the basis of alleged water and sewer delinquencies alone (City's brief before Appellate Division, First Department, p. 24). Petitioners dispute both the legal and factual basis for this contention. As with the primary

(footnote continued on next page)

the claimed amounts had been prepaid, petitioners had no assurance that they would obtain a trial on the merits of their certiorari claims within any reasonable or foreseeable time thereafter. The Court never offered to provide a trial on the merits if petitioners prepaid the amounts claimed, and no existing procedure would prevent foreclosure in the event such payments were made except upon waiver of substantial legal and constitutional rights. Specifically, the City's so-called "settlement offer" (29a), made when its motion for summary judgment was pending, was conditioned upon petitioners' waiver of basic rights:

> (a) Summary judgment would be entered *ex parte* upon petitioners' failure to pay within 60 days any additional amounts found due. Among other things, this would cut off their right to request an extension of time to pay or a stay (29a);
>
> (b) All pending motions seeking broader relief would have to be withdrawn (29a); and
>
> (c) These dictated terms would not be revealed to the tax certiorari court in any way (29a).*

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tax, the amount of water and sewer charges was in dispute, since (a) many of the parcels are vacant and there was no water consumption (R 475-479); and (b) petitioners claimed that the City has deprived them of the right to collect rents sufficient to pay any such charges as a result of rent restrictions and the high cost of mandated services.

* The City also contended in an affirmation in connection with post-judgment proceedings here that a trial on over-valuation could only be had if petitioners waived their claims of inequality:

> "The owners may argue that they have the right to a trial on the basis of inequality but they cannot deny that they could have had a trial and/or settlement by now had they chosen to argue their case only on the basis of over-valuation. The choice was theirs and they should not now be heard to complain that the City is preventing a trial of their Certiorari case." (Affirmation of Hyman Weber, Esq. dated April 29, 1981.)

Petitioners appealed from the orders and judgments of the Supreme Court, New York County. On December 18, 1980, the Appellate Division, First Department, affirmed without opinion, and on March 26, 1981, the Court of Appeals of the State of New York dismissed petitioners' appeal as of right on the ground that "no substantial constitutional question is directly involved."*

Presentation of Petitioners' Federal Question in the Courts of New York State

Petitioners raised the federal question sought to be reviewed by this Court before the Court of first instance, the Supreme Court, New York County (R 72, 107, 108, 237-238, 322-323, 355, 525, 528, 533, 534, 546, 595). In opposition to the City's motion for summary judgment, petitioners contended that

> "the City through its deliberate bureaucratic delay and excessive, arbitrary and capricious regulations has . . . made it virtually impossible . . . to pay the spiralling costs of . . . real estate taxes, fuel, oil, utilities, repairs, maintenance and other legally mandated essential services [and] that the City . . . has created an actual and virtual confiscation of such property in violation . . . of the Fifth and Fourteenth Amendments of the United States Constitution . . ." (R 218-219).

* Petitioners thereafter initiated an action against the City of New York in the Federal District Court for the Southern District of New York under 42 U.S.C. § 1983, asserting that the totality of the City's conduct including but not limited to the *in rem* foreclosure judgments constituted a taking of property without due process of law in violation of the Fourteenth Amendment (*Friarton Estates Corp., et al.* v. *City of New York, et al.*, 81 Civ. 3022 [CLB]). The City has taken the position in that action that the decisions of the New York Courts are *res judicata* and conclusive upon petitioners in the federal action, and that petitioners' sole remedy is before this Court. To date, the District Court has not ruled on the contentions of any of the parties.

In support of their motion for reargument before the Supreme Court, New York County, petitioners further claimed that

> "the combined effect . . . of the Rent Control Laws, the clearly unconstitutional fractional tax assessments, and *In Rem* foreclosure laws constitutes an unconstitutional taking of property without due process of law" (R 533).

The State Court recognized that these issues were raised, although it refused to rule on them:

> "[I]f in fact the taxes were improperly over-assessed and if [petitioners] did not have a reasonable opportunity to obtain a proper assessment, [taking of title by the City pursuant to Title D of the Administrative Code] would be an unconstitutional taking of property without compensation . . . ." (22a-23a).

In its order and decision on petitioners' motion for reargument the Court specifically acknowledged that petitioners had raised "procedural due process questions" (26a), but held that such questions were "mooted" by petitioners' failure to prepay assertedly conceded amounts (26a).

Petitioners also raised their federal question on appeal before the Appellate Division, First Department (Respondents-Appellants' [petitioners'] Brief, pp. 22-26; Respondents-Appellants' [petitioners'] Reply Brief, pp. 11, 13), and the Court of Appeals of the State of New York (Respondents-Appellants' [petitioners'] Jurisdictional Statement, pp. 2-4, 5-8, 9-10). The Appellate Division affirmed the orders and judgments of the court below without opinion (3a), necessarily passing on the federal constitutional issue, and the Court of Appeals dismissed petitioners' appeal squarely on the ground that "no substantial constitutional issue is directly involved" (2a).

Reasons for Allowance of the Writ

I. The judgments ordering confiscation for alleged nonpayment of real estate taxes, with no realistic possibility of trial on the merits of the assessments, contradicted principles established by this Court.

The right to a meaningful hearing before irrevocable adverse action (such as here, confiscation of real property) is well established by numerous decisions of this Court. See *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

In *Rosewell* v. *LaSalle National Bank*, 49 U.S.L.Week 4285 (1981), this Court held a two-year delay in tax refund adjudications insufficient to justify District Court intervention under the Tax Injunction Act, 28 U.S.C. § 1341. The concurring opinion indicated that the two-year period "perhaps only barely" met Tax Injunction Act standards. 49 U.S.L.Week at 4292. Four members of this Court noted in dissent that "[i]n its discussion of the jurisdictional question presented by this case, the Court correctly assumes that the administration of Cook County's system of taxing real property has violated respondent's federal constitutional rights." 49 U.S.L.Week at 4292-3.

Here, there is far more egregious and deliberate delay, combined with extreme and confiscatory overassessment. Further, the Tax Injunction Act is obviously not a barrier to granting this petition for review by this Court. The City itself acknowledged the extreme delay of petitioners' tax certiorari proceedings when it asserted that consolidat-

ing its *in rem* foreclosure proceeding with petitioners' tax certiorari cases would delay the *in rem* proceeding "indefinitely" (27a). Moreover, the State Court denied petitioners' motions for trial preferences in the cases, some of which are now seven years old.

The State Courts ruled that petitioners' federal claims were "mooted" because they did not prepay assertedly conceded amounts which were vastly in excess of the value of the property (26a). But the City's so-called "settlement offer" permitting interim partial payments would have required petitioners to withdraw all motions before the State Courts, to consent to *ex parte* summary judgment in the event of a single late payment and to waive substantial other rights (29a).

Moreover, without knowing the ultimate tax burden on the property and with no reasonably prompt remedy, petitioners would have had to pay large amounts that would have been totally lost if significant reductions could not be obtained. The undeterminable tax burden would also make it difficult, if not impossible, to sell or obtain any financing on the properties. Compare *United States* v. *O'Connor*, 291 F.2d 520 (2d Cir. 1961); *Bailey* v. *United States*, 415 F. Supp. 1305, 1314 (D.N.J. 1976).

It seems clear from the opinions of the members of this Court in *Rosewell* that the principle of "pay first, contest later" is valid when and only when a reasonably prompt subsequent adjudication of the merits is clearly available. The contrary was the case here due to the deliberate actions of the City.

II. This case is of great public importance because the impact of *in rem* foreclosures based on massive overassessments, especially when combined with restrictions on income from real properties, mandated services and blockage of trials on the merits of the assessments, is widespread and catastrophic.

The properties here sustained large operating losses for many years because of the City's combined rent restrictions and mandatory services (R 308-315). These losses were not taken into account in the assessed valuations fixed by the City, which were large multiples of fair market value, as shown by arms-length transactions (R 478-479, 531). This problem is not unique to petitioners but is widespread in the City of New York. Thousands of properties are being taken by the City under similar circumstances, with catastrophic effects on the owners, the public and the City's long-term tax base (30a-33a).* The City has greatly exacerbated the widespread character of such harm by obtaining a Court-ordered stay of all tax certiorari cases in New York County in which inequality of assessment is claimed (27a), without notice to petitioners.

Moreover, the administration of the real property tax system in New York City has come under severe criticism even from official sources (34a-36a), including a study commissioned by the City itself which termed City assessments "hideously inequitable" (34a). There are also pub-

* As stated in J. Jacobs, *The Death and Life of Great American Cities*, p. 254 (1961): "The way to raise the tax base of a city is not at all to exploit to the limit the short-term tax potential of every site. This undermines the long-term tax potential of whole neighborhoods."

lished reports that the City has refused to permit taxpayers generally to gain access to evidence necessary to substantiate claims of inequality of assessment (37a-40a).

Petitioners' data indicate that New York City real estate taxes frequently exceeded fifty percent and reached as high as sixty-three percent of the gross revenues of these properties. However, petitioners were denied the opportunity to prove such facts at a trial in State Court (R 301). Such taxes—hardly unique to these properties alone—could be found confiscatory on their face.

Where a taxing authority imposes taxes, denies petitioners sufficient income to pay the taxes and to provide required services, and then refuses to take this into account in determining its assessed valuations, petitioners contend that confiscation in violation of due process has occurred. Petitioners' contentions below encompassed violations of State law, denials of equal protection, and confiscation without due process through the combination of City strangulation of revenues and impossibly escalating tax and required service costs. Denial of any opportunity to prove such claims is widespread, in violation of decisions of this Court, and is consequently of great public importance.

Confiscation of petitioners' properties by the City under these circumstances presents an important question of federal law which has not been, but should be, settled by this Court.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the order of the Court of Appeals of the State of New York.

Respectfully submitted,

RICHARD AYRES GIVENS
BOTEIN, HAYS, SKLAR & HERZBERG
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

ROGER F. BLOOM
GINA SCHACHTER
BOTEIN, HAYS, SKLAR & HERZBERG
Of Counsel for Petitioners

APPENDIX

Order of the Court of Appeals, March 26, 1981

STATE OF NEW YORK COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of March A.D. 1981

Present:

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

1 Mo. No. 206

IN REM TAX FORECLOSURE ACTION NOS. 29 and 30
BOROUGH OF MANHATTAN.

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

FRIARTON ESTATES CORP., RENT CONTROL MEMORIAL CORP., BRONTEL LTD., and WEST PATERSON 46 CORP.,

Appellants,

v.

CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion upon the ground that no substantial constitutional question is directly involved.

/s/ JOSEPH W. BELLACOSA

JOSEPH W. BELLACOSA
Clerk of the Court

Order of the Appellate Division, December 18, 1980

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 18, 1980

Present:

HON. THEODORE R. KUPFERMAN, Justice Presiding
HAROLD BIRNS
ARNOLD L. FEIN
LEONARD H. SANDLER
VINCENT A. LUPIANO, Justices.

9511-12-13-14

IN REM TAX FORECLOSURE ACTION No. 29 & 30
BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

FRIARTON ESTATES CORP., RENT CONTROL MEMORIAL CORP., AND BRONTEL, LTD.,
Respondents-Appellants,
against

CITY OF NEW YORK,
Petitioner-Respondent.

An appeal having been taken to this Court by the respondents-appellants from four orders, each entered on August 31, 1979, and four amended supplemental judgments of the Supreme Court, New York County (M. Evans, J.), entered thereon on May 20, 1980, which, *inter alia*, granted the petitioner City of New York summary judgment of foreclosure in the respective actions, and which severed respondents' counterclaims, denied the defenses to foreclosure and stayed the City from any action until 10 days after entry,

And said appeal having been argued by Mr. Richard A. Givens of counsel for the appellants, and by Mr. Morris Einhorn of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the four orders and the amended supplemental judgments so appealed from be and the same are hereby affirmed, without costs and without disbursements.

ENTER:

/s/ FRANCIS X. GALDI
Deputy Clerk.

Order of the Supreme Court, New York County, August 31, 1979*

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM PART I, NEW YORK COUNTY

At the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present:

Honorable Martin Evans,

Justice.

FORECLOSURE ACTION No. 29

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3666 [sic]	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

Upon the foregoing papers this motion is decided in accordance with memorandum opinion.

Martin Evans
J.S.C.

Filed and entered
August 31, 1979

* Identical orders were filed and entered for each of four groups of parcels. All of the parcels are listed in the above caption.

Supreme Court, New York County, Amended Supplemental Judgment of Foreclosure with Affidavit, May 20, 1980*

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse, Foley Square in the Borough of Manhattan, City of New York, on the 15th day of May, 1980

Present:

HON. MARTIN EVANS, *Justice.*

Index No. 46001/77

IN REM TAX FORECLOSURE ACTION NO. 29
BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

* Judgments with annexed affidavits that are identical except for the name of the owner were filed and entered for each of four groups of parcels. All of the parcels are listed in the above caption.

Upon reading the judgment of foreclosure, the decision of this Court and the affidavit of regularity previously filed in this In Rem Action, and upon reading and filing the annexed Notice of Motion and the annexed affidavit of Steven Leigh Gittleson duly sworn to on January 9, 1980, from which it appears that a List of Delinquent Taxes was filed herein on July 6, 1977; that the City of New York, in filing said list, complied with all the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York; that the judgment of foreclosure entered herein provided for the severance of the above-captioned property from this action because of an answer interposed as to said property on or about September 16, 1977 by Martin R. Fine, Esq., as attorney for Friarton Estates Corp. [Brontel, Ltd. and Rent Control Memorial Corp.], owner[s] of said parcels, that said judgment of foreclosure gave leave to The City of New York to proceed against such answer to a final disposition under the caption of this action in the manner prescribed by law; that on or about August 11, 1978 The City of New York moved this Court for an order striking said answer, dispensing with a separate judicial sale of said property and granting a final judgment of foreclosure;

Now, upon reading and filing the said notice of motion dated July 24, 1978, the affidavit in support of said motion of Steven Leigh Gittleson, sworn to on July 24, 1978, the reply affirmation of Edward A. Friedman, dated October 16, 1978, the notice of cross-motion dated October 16, 1978 for leave to submit an amended answer in this matter and to consolidate the instant in rem matter with tax certiorari proceedings, the affirmation of Edward A. Friedman, dated October 16, 1978, in support of said cross-motion, and other supporting affidavits sworn to on or about October

16, 1978, the reply affirmation and affirmation in opposition to cross-motion of Steven Leigh Gittleson dated November 8, 1978, the reply affirmation of Edward A. Friedman, dated November 20, 1978, the sur-reply affirmation of Steven Leigh Gittleson, dated December 29, 1978, the sur-reply affirmation of Edward A. Friedman, dated January 15, 1979, the affidavit of Martin R. Fine, dated January 18, 1979; the order to show cause for consolidation of in rem tax foreclosure actions no. 29 and 30 and for certification of class action status, dated January 18, 1979, and the supporting affirmation of Martin R. Fine, dated January 17, 1979, the affirmation in opposition of Judah Dick, Assistant Corporation Counsel of the City of New York, dated February 28, 1979, the supplemental affirmation of Martin R. Fine, dated April 20, 1979, the supplemental affirmation of Judah Dick, dated April 24, 1979, and upon oral argument on the various motions and cross-motions and the submission reading and filing the further of all papers on April 25, 1979 and on supplemental affirmation of Martin R. Fine, dated April 29, 1979; and upon the decision of the Court dated August 31, 1979, denying defendant's motion for certification of class action status and granting defendant's motion for consolidation of the instant in rem tax foreclosure action no. 29 with action no. 30, and upon the further decision of the Court, dated August 31, 1979, denying defendant's cross-motion for consolidation of the instant in rem tax foreclosure action with tax certiorari matters, granting defendants cross-motion to amend its answer in in rem tax foreclosure action no. 29 but finding and determining thereafter that all of the defenses in said amended answer are without merit, and granting the City's motion for summary judgment, and

The only motion before the Court being the City's motion to strike the answer interposed in in rem action no. 29.

Now, on motion of Allen G. Schwartz, Corporation Counsel, attorney for The City of New York, it is

Ordered, that defendant's cross-motion for leave to serve and file the amended answer, without the second and fourth defenses and without the counterclaim is granted, there being no merit to the second defense and no legal basis for the fourth defense, and the pleading, as restated, is deemed to have been served; and it is further

Ordered, that defendant's counterclaims, which are not permitted in an in rem tax foreclosure action pursuant to Section D17-9.0 (d) of the Administrative Code of the City of New York, shall be severed and continued in a separate action, and it is further

Ordered, that defendant's cross-motion to consolidate the pending tax certiorari cases with the present in rem foreclosure action is denied, and it is further

Ordered, that the remaining first and third defenses in the defendant's amended answer are without merit and are thereby stricken from said answer, and it is further

Ordered, that defendant's motion for certification of class action status is denied, and it is further

Ordered, that defendant's motion to consolidate in rem tax foreclosure actions nos. 29 and 30 is granted, but that the plaintiff, City of New York, shall take title to the above-

captioned premises in in rem tax foreclosure action no. 29 only, and action No. 30 shall be discontinued in so far as such action affects the above-captioned premises, and it is further

ORDERED, that the City's motion for summary judgment is granted and it is further

ORDERED, that the judgment of foreclosure previously entered in this In Rem Action is hereby vacated insofar as said judgment severed the above-captioned property from said action, and it is further

ORDERED, ADJUDGED and DECREED that The City of New York is the owner and holder of unpaid tax liens affecting the above-captioned property in the amounts, together with interest thereon, as shown in the List of Delinquent Taxes on file herein, and it is further

ORDERED, ADJUDGED and DECREED that a separate judicial sale of the above-captioned property is hereby dispensed with and the Finance Commissioner of The City of New York is hereby directed to prepare, execute and cause to be recorded a deed conveying to The City of New York full and complete title to the above-captioned property, subject only to tax liens accrued or accruing subsequent to those contained in the List of Delinquent Taxes herein, and it is further

ORDERED, ADJUDGED and DECREED that upon execution of said deed by the Finance Commissioner of The City of New

York, the City of New York shall be seized of an estate in fee simple absolute in the above-captioned property, and other persons including the State of New York, infants, incompetents, absentees and non-residents who may have any right, title, interest, claim, lien or equity of redemption in or upon such property shall be barred and forever foreclosed of such right, title, interest, claim, lien or equity of redemption, and it is further

ORDERED, ADJUDGED and DECREED that upon execution of said deed, The City of New York shall have possession of the above-captioned property and such possession is hereby awarded.

The following is a description of the parcel of property as to which final judgment in favor of The City of New York is hereby granted, designating said parcel by Serial Number as the same appears in the List of Delinquent Taxes herein, and by section, block and lot numbers as the same appear on the Tax Map of The City of New York for the Borough of Manhattan and in the aforesaid List of Delinquent Taxes:

> All these certain lots, pieces, or parcels of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City and State of New York, more particularly designated on the Tax Map of The City of New York for the Borough of Manhattan as the said Map was on the 6th day of July, 1977 as follows:

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

And, it is further

ORDERED, that petitioner, City of New York shall be permitted to enter and file this judgment but shall be otherwise stayed from taking any other action herein for the ten (10) days after entry.

Martin Evans
J.S.C.

Norman Goodman
Clerk

Filed and entered
May 20, 1980

Affidavit of Steven Leigh Gittleson, Annexed to Amended Supplemental Judgment

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

Index No. 46001/77

IN REM TAX FORECLOSURE ACTION No. 29

BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

State of New York)
County of New York)

STEVEN LEIGH GITTLESON, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel of The City of New York, in charge of the prosecution of the above-

captioned action, and fully familiar with all of the matters herein set fort

2. This affidavit is made for the purpose of procuring a judgment of foreclosure as to the above-captioned property pursuant to the provisions of Section D17-12.0 of the Administrative Code of The City of New York.

3. This In Rem Action was commenced by filing of a List of Delinquent Taxes, including the above-captioned property, in the office of the Clerk of New York County on July 6, 1977, and was concluded by the entry of a judgment of foreclosure on May 25, 1978. Said judgment was supported by a judgment roll consisting of exhibits; affidavits of filing, posting, mailing, publication and regularity, and by a decision of this Court made on May 25, 1978, containing a statement of the facts found and the conclusions of law thereon, all showing compliance by The City of New York with the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York.

4. Said judgment of foreclosure provided for the acquisition by The City of New York, by a deed of the Finance Commissioner, of all parcels contained in said List of Delinquent Taxes as to which the failure to redeem or answer had resulted in a default in this In Rem Action, for the discontinuance of said In Rem Action and the cancellation of the lis pendens pertaining thereto as to all parcels as to which had been withdrawn, redeemed, condemned or included improperly or through error, and for the severance from this In Rem Action of all parcels as to which an answer had been interposed, with leave to The City of New York

to proceed against such answers to a final disposition under the caption of this action in the manner prescribed by law.

5. The above-captioned property was among the parcels severed from this In Rem Action because of an answer interposed on or about September 16, 1977 by Martin R. Fine, Esq., as attorney for Friartion [sic] Estates Corp. [Brontel, Ltd., and Rent Control Memorial Corp.], owner of said parcel.

6. On or about July 24, 1978, The City of New York, by a motion returnable on August 11, 1978, moved this Court for an order striking said answer, dispensing with a separate judicial sale and granting a final judgment of foreclosure. After service of the notice of motion on defendant's attorney but before the August 11, 1978 return date, Goldberg, Weprin and Ustin, Esqs., were substituted as the defendants's attorney of record in this matter. After several adjournments, defendant served upon the City the reply affirmation of Edward A. Friedman, dated October 16, 1978, responding to the City's notice of motion for summary judgment and a notice of cross-motion, dated October 16, 1978, for leave to submit an amended answer in this matter and to consolidate the instant in rem matter with tax certiorari proceedings, together with an affirmation of Edward R. Friedman, dated October 16, 1978, in support of said cross-motion, and other supporting affidavits sworn to on or about October 16, 1978. Thereafter, the City served an affirmation in reply to defendant's opposition papers concerning the City's motion for summary judgment, dated November 8, 1978 and an affirmation in opposition to defendant's cross-motion, dated November 8, 1978. Thereafter further reply papers were served by the respective

parties, to wit, the reply affirmation of Edward A. Friedman, dated November 20, 1978, the sur-reply affirmation of Steven Leigh Gittleson, and the sur-reply affirmation of Edward A. Friedman, dated January 15, 1979.

7. On or about January 19, 1979 defendant served a motion by order to show cause to consolidate In Rem Tax Foreclosure Actions No. 29 and 30 and to certify owners of property included in said actions for class action status, toegther with supporting affirmation of Martin R. Fine, dated January 17, 1979. The City of New York opposed such order to show cause by an affirmation of Judah Dick, Assistant Corporation Counsel of the City of New York, dated February 28, 1979. Thereafter supplemental affirmations concerning the various above mentioned motions and cross-motions were filed; to wit, the supplemental affirmation of Martin R. Fine, dated April 20, 1979 the supplemental affirmation of Judah Dick, dated April 24, 1979 and the affirmation of Martin R. Fine, dated April 29, 1979. On April 24, 1979 the various motions and cross-motions were argued orally before this Court.

8. In the decisions of the Court per Justice Evans dated August 31, 1979, the following determinations were made:

(a) Defendant's motion for certification of class action status was denied.

(b) Defendant's motion for consolidation of the instant In Rem Tax Foreclosure Action No. 29 with Action No. 30 was granted.

(c) Defendant's cross-motion for consolidation of the instant In Rem Tax Foreclosure Action with Tax Certiorari matters was denied.

(d) Defendant's cross-motion to amend its answer in In Rem Tax Foreclosure Action No. 29 was granted, but it was found and determined thereafter that all of the defenses in said amended answer were without merit.

(e) The City's motion for summary judgment was granted.

9. Since the City has made a motion for summary judgment in In Rem Tax Foreclosure Action No. 29 only, and said motion was granted by the Court and since the City has not yet submitted judgment papers in In Rem Tax Foreclosure Action No. 30, the annexed supplemental judgment of foreclosure concerns Manhattan Action No. 29 only.

10. In view of the fact that the City's motion has been granted, The City of New York is entitled to a judgment providing the relief requested in said motion. Since a judgment of foreclosure as to this In Rem Action has already been entered under the caption of said action, it is now necessary for this Court to make its supplemental judgment under said caption as to the above-captioned property. Since the judgment of foreclosure previously entered as this In Rem Action was supported by a full and complete recitation as to the City's compliance with all of the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York, it should not be necessary to encumber this record by a repetition of said lengthy recital as to the City's compliance with said code in support of the supplemental judgment now required to [be] entered. Such repetition can be avoided by vacating judgment of foreclosure previously entered as to this In Rem Action insofar as it severed said action as to the above-captioned property.

Such vacatur would re-assert and re-attach as to said property the judgment roll submitted by the City in this In Rem Action and the decision of this Court dated May 24, 1978, insofar as said instruments show compliance by The City of New York with the requirements of Title D of Chapter 17 of Administrative Code of The City of New York. The supplemental judgment of foreclosure to be rendered and entered in this In Rem Action as to the above-captioned property should accordingly provide as follows:

a. Granting the City's motion in all respects.

b. Vacating the judgment of foreclosure previously entered in this In Rem Action insofar as said judgment severed the above-captioned property from said action.

c. Striking the answer interposed as to the above-captioned property.

d. Dispensing with a separate judicial sale of the above-captioned property.

e. Awarding to The City of New York possession of the above-captioned property.

f. Directing the Finance Commissioner of The City of New York to prepare and cause to be recorded a deed conveying to The City of New York full and complete title to said real property subject only to tax liens accrued and accruing subsequent to those contained in the List of Delinquent Taxes.

g. Decreeing that upon the execution of such deed, The City of New York shall be seized of an estate in fee simple absolute in such real property and barring and forever foreclosing any and all persons, including the the State of New York, infants, incompetents, absentees

and non-residents who may have had any right, title, interest, claim, lien or equity of redemption.

No previous application has been made for the relief sought herein.

/s/ STEVEN LEIGH GITTLESON

STEVEN LEIGH GITTLESON

Sworn to before me this
9 day of January, 1980

/s/ HYMAN WEBER

HYMAN WEBER
Notary Public, State of New York
No. 41-9560005
Qualified in Queens County
Commission Expires March 30, 1980

Supreme Court, New York County
Memorandum Opinion, August 31, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: SPECIAL TERM PART I

Index #46001/77

Motion No. 136

Also 131, 132 & 134

FORECLOSURE ACTION No. 29

against

Serial No.	*Section*	*Block*	*Lot*
2289	3	735	30

MARTIN EVANS, J.:

In foreclosure action No. 29, the City moves for summary judgment under CPLR 3212. The action was instituted on or about July 16, 1977 by filing a verified list of delinquent taxes, and defendants interposed an answer on or about September 16, 1977. In their answer, in addition to a general denial, as part of which it alleged that the taxes properly due were paid, it alleged that its equity was greater than the tax and requested a severance for the purpose of sale. It also interposed a counterclaim, seeking damages in the sum of $1,000,000 alleging that the City, through the concurrent imposition of rent control and tax increases, made payment of taxes impossible and had the result of an unconstitutional taking of its property.

Defendant, by way of crossmotion, seeks several different grounds of relief. It seeks, first, to consolidate with this foreclosure action, four pending certiorari cases which were instituted by it, or by its predecessors [sic] title, which sought a reduction in the taxes that had been assessed against the property.

It also seeks leave to serve and file an amended answer. In its proposed amended answer, in addition to its general denial, it proposes four defenses and the same counterclaim it had originally interposed. The first defense, based on a claim that its equity is larger than the taxes due, requests, under Adm. Code D 17-9.0(e) a six month extension of time to have the property sold.

Its second defense alleges the unconstitutionality of the In Rem statute, alleging that the recent reduction of the statutory period of time from 3 years to 1 year creates an impermissable [sic] bias in favor of one and two family dwellings and thus denies any protection to the owners of other buildings. That claim was passed upon and held to be without merit in the well-reasoned opinion of Justice Greenfield in *Sonmax, Inc.* v. *City of New York* 89 Misc 2d 945, aff'd 43 NY 2d 253.

Its third defense alleges that there is a tax certiorari proceeding to reduce taxes, and that it would be inequitable to foreclose for the failure to pay the tax at a time when it is claimed the taxes should not be assessed at the amount claimed by the city.

The fourth defense alleges that the change in the In Rem foreclosure period from 3 years to 1 year lacks the approval of the State Legislature and conflicts with the New York State Real Property Tax Law and is therefore

illegal. There is no basis for this defense. See *Sonmax, Inc.* v. *City of New York, supra.*

It is settled law that leave to amend a pleading is freely given, unless prejudice is shown. The Court has power, however, if it desires to exercise it, to examine the pleading in order to determine whether or not there is merit to it.

In the instant case, there is patently no merit to the second and fourth defense.

Furthermore, counterclaims are not permitted in a foreclosure action such as this. Adm. Code D 17-9.0(d). Although there may be merit to that claim in that the remedy for a shortage of housing caused by a wartime emergency in 1943 may itself have become the cause of the present day shortage of housing, see *Benson Realty Corp.* v. *Beame,* Sup. Ct. Kings County, Sp. I, 180 NYLJ No. 66, Oct. 4, 1978, Page 13; *HDA-CHIP,* 90 Misc.2d 813 this action is not the proper vehicle for it. It is to be severed and continued.

The motion for leave to serve and file the amended answer, without the second and fourth defenses, and without the counterclaim, is granted, and the pleading as restated, is deemed to have been served.

Defendant's motion, to consolidate the pending tax certiorari cases with this foreclosure action, is denied. No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein.

It would, of course, be inequitable to allow In Rem foreclosure under Title D of the Administrative Code, which could result in a transfer of title to the City, if in fact the taxes were improperly over-assessed and if defendant did not have a reasonable opportunity to obtain a proper

assessment. Such a transfer of title would be an unconstitutional taking of property without compensation. However, the issue, as to whether or not the tax assessments were in the proper amounts, is tendered by the 2nd paragraph of the answer, in which it is alleged that all taxes and assessments which were lawfully assessed, have been paid. If that can be proved, defendant would have a defense to this foreclosure action.

With respect to the City motion for summary judgment under CPLR 3212, the City has shown that taxes were properly assessed and have not been paid. Although the pleadings of the defendant allege that all taxes lawfully due have been paid, it is clear from the affidavits submitted on the motion that not only is there a default in the payment of the amount of taxes assessed; there has been a default in the payments of the amount of taxes admitted by defendants to have been properly due.

Essentially, their defense to that showing, is that they were unable, by reason of other economic considerations, to make those payments. That is not a defense to this action, although it may be the basis for their counterclaim.

The 1st defense, which only requests an extension of time for six months in order to enable the sale of the property, has been given practical effect by the delay in these proceedings; and no longer constitute a valid defense.

Defendants' reliance on the determination by the Court of Appeals in *Hellerstein* v. *Assessor of Town of Islip*, 37 NY 2d 1, is misplaced. Although the Court did hold the practice of fractional assessment to be in violation of statute, it specifically refused to disturb previously settle [sic] assessment rolls or to declare them a nullity. Recog-

nizing the difficulties of transition, its direction was prospective only.

The motion by the City for summary judgment is accordingly granted.

Dated: 8/29/79

Martin Evans
J.S.C.

Filed and entered
August 31, 1979

Supreme Court, New York County
Order and Decision, January 3, 1980

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present:

HONORABLE MARTIN EVANS

Justice.

REM TAX FORECLOSURE ACTION

Nos. 29 & 30 Borough of Manhattan

Serial No.	*Section*	*Block*	*Lot*
3365 et al.	4 et al.	1042 et al.	2 et al.

Upon the foregoing papers this motion seeking *inter alia*, to reargue the decision of this Court dated August 31, 1979, is denied. Movant has failed to meet its burden of proving that the Court misunderstood, misconstrued, overlooked or incorrectly decided any question of law or fact. Movant has attempted to relitigate matters already decided after intensive deliberation by the Court, and to litigate matters which are neither material nor relevant to this proceeding, *e.g.*, the theoretical and factual merits of the rent control laws. The Court is constrained to

observe that movant's excessively prolix papers are inappropriately argumentative. They largely raise public policy questions which worded in substantive due process language, are matters which must ultimately be decided by the Legislature, not the Judiciary. Insofar as they raise procedural due process questions, such have already been mooted by movant's failure to pay even those taxes which would have been due had the valuation been what movant has claimed.

Dated: 12/27/79

Martin Evans
J.S.C.

Filed and entered
January 3, 1980

Documents Regarding City Delay of Petitioners' Tax Certiorari Trials and Delay of Such Trials Generally by the City

Excerpt from Sur-Reply Affirmation of Assistant Corporation Counsel, Dated December 29, 1978, Opposing Petitioners' Motion for Consolidation of Tax Certiorari Cases with *In Rem* Action No. 29 (R 170)

"It is submitted that an order of Consolidation would work an extreme hardship upon the City, and would in effect forestall any remedy to the City for defendants' extreme tax delinquencies indefinitely."

Order of Supreme Court, New York County, Staying "Inequality Calendar," New York Law Journal, December 5, 1980, p. 6

"*Freewalt Realty Corp* v. *Finance Administrator and Tax Comissioners*—The inequality calendar of this court in all respects is stayed pending final Appellate determination of Colt Industries v. Tax Commission of the City of New York, or further order of the Appellate Division."

Excerpt from Affirmation of Assistant Corporation Counsel, Dated October 29, 1980, in Support of Application for Stay of "Inequality Calendar," Supreme Court, New York County

"I submit this affirmation in support of respondents' application for a stay of proceedings on the inequality calendar of this Court including litigation of the value of the subject properties."

Excerpt from *Real Estate Weekly*, December 11, 1978, p. 1, "City Resumes Hearings Reviewing Tax Disputes [After Four Years of Suspension of Hearings]"

"New York City will resume its real estate tax review proceedings on assessments on a full-time basis beginning in January.

"The hearings were suspended for nearly four years because they were found to be 'ineffective,' according to Tax Commissioner Mary E. Mann."

Substance of City's So-Called "Settlement Offer"

Excerpt from Letter, Dated February 8, 1979, from Assistant Corporation Counsel to Counsel for Petitioners, Conditioning Partial Payment Proposal upon Waiver of Rights by Petitioners (R 194)

"It is . . . proposed that your clients make a partial payment limited to the taxes due on the claimed value set forth in your petitions for review of assessments, plus all water charges, sewer rents and accrued interest, The City Collector to apply such payments to the oldest open items. Should the Court fix values above your claimed values, your clients will then pay the balance within 60 days and consent to the City's entry of summary judgment ex parte upon their failure to do so. All pending motions will be withdrawn. It is understood that this arrangement will be incorporated into a stipulation and that it will not be introduced in any way at the certiorari trial."

Reports of Widespread Problem of Abandonment of Rent-Controlled Properties Generally and Problem of Tax-Foreclosed Properties Held by the City of New York

Statement of Assistant Secretary of the Treasury Robert A. Gerard on the Effects of Rent Control on the Abandonment of Rental Housing, Assessed Valuation and Taxation, November 2, 1976 (R 491)

"Our office has carefully analyzed numerous objective studies which support the conclusion that rent control has adversely affected the City's economic condition.

"I think you will be interested in the following economic facts which enumerate the adverse effects of rent control:

"*Abandonment* — Since 1960, approximately 300,000 housing units have been lost through abandonment.

"In the last five (5) years alone, the housing stock has lost 25,000 to 30,000 units per year, primarily through abandonment.

"*New Housing* — Less than 15% of New York City's rental housing stock has been constructed since 1960.

"New housing unit starts declined from a peak of nearly 71,000 in 1962 to less than 4,000 in 1975.

"Rates of new construction in abutting jurisdictions which do not have rent control—e.g. northern New Jersey —are substantially higher than in New York City.

"*Value and Taxation* — The aggregate assessed valuation of multi-family residential property declined $1 billion from $12.5 billion to $11.5 billion—from 1974 to 1975.

"The market value of rent control property declined 31% in 1974; values of property subject to rent stabilization declined 18% in 1974.

"Aggregate real estate tax arrearage through fiscal year 1975 was nearly $500 million.

"Real estate tax arrearage in fiscal year 1976 alone is estimated to be $234 million.

"22.6% of walk-up buildings—predominantly rent-controlled—are delinquent in tax payments.

"I want to assure you that we will continue to take a firm stand on this matter, emphasizing the importance of phasing out rent control as quickly as possible. Only by such action can New York City strengthen its real estate tax base, slow the rate of abandonments, and foster a climate that will encourage investment in new construction and better maintenance of existing rental units."

Excerpt from New York Times, October 10, 1980, p. A 23, "Approach to Rehabilitation of West Harlem's Housing"

"Galen Kirkland, deputy director of housing for the [Harlem Community] organization, estimates that 40 percent of all privately built housing in West Harlem has fallen into city hands through tax foreclosure.

* * *

"... the Department of Housing Preservation and Development is wary about taking too many buildings in one lump without adequate resources to manage them. So it divided the Manhattan takings into three parts, and last month it took about 100 occupied Manhattan buildings with an estimated 1,200 tenants, plus about 150 vacant buildings.

They are in East Harlem, Washington Heights, midtown and part of lower Manhattan, but not West Harlem or the Lower East Side. The next West Harlem taking is scheduled for March.

* * *

"One of the first steps of the community managers is to lift rents to at least $40 a room, the minimum necessary for successful management, as buildings are made habitable.

* * *

". . . Mr. Kirkland says that the city's procedures to speed up takeovers of tax delinquent buildings is not helping to preserve housing.

" 'The law isn't working', he said. 'The only thing it's doing is bringing more buildings into city ownership. The city thought the owners would be more responsible and keep their taxes up to date. It hasn't happened. The landlords are still walking away.' "

Excerpt from New York Times, November 21, 1980, p. B 9, "City Urged to Move Faster in Selling Foreclosed Housing"

"... William B. Eimicke, deputy commissioner of property management in the [New York City] housing department ... concedes the department's reluctance to resume the selling of occupied tax-foreclosed buildings, especially larger ones. Such sales run the risk of bringing the property back into city hands within a few years, he said, a 'revolving door' that brought the department into control of the management of tax-foreclosed property in the first place.

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"The city is holding 35,000 occupied apartments in about 4,100 buildings, run by a staff of 1,000. In addition, 420 handymen and 1,800 superintendents are financed through private contracts. The federally financed cost is $80 million a year ...."

Criticism of Administration of New York City Real Property Tax Assessment System from Official Sources

Excerpt from New York Times, April 24, 1981, p. 1, "Study for City Calls Realty Tax 'Hideously Inequitable' "

"A study prepared for New York City's Department of Finance has concluded that property tax assessments in the city are "hideously inequitable," favoring wealthier neighborhoods over poorer areas and owners of private homes over apartment dwellers.

"The system by which the city taxes the 830,000 parcels of real estate in the five boroughs is really a "nonsystem," the report said. It added:

" 'Our present assessment nonsystem is yet another signal to the world that this city—which once was the best-governed of large American cities—has a municipal government that doesn't work.'

"Yesterday, when asked about the study's findings, Mayor Koch called them 'unacceptable,' although he said that it was 'no secret that the current tax assessment system is inequitable and needs to be revamped.'

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"The study was commissioned in 1979 and was coordinated by Dick Netzer, dean of New York University's Graduate School of Public Administration and a leading authority on municipal finances and taxation. It was intended to help the city form an overall policy in the long, often heated debate on overhauling tax-assessment procedures.

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". . . The report said, broad disparities have arisen between essentially similar properties because of the city's failure to reassess many real-estate parcels over the years."

Excerpts from *Real Estate Inequalities in New York City Among Similar Types of Property*, pp. i-ii, Submitted to the Financial Control Board and Municipal Assistance Corporation of the State of New York by the Office of the State Comptroller and the Office of the Special Deputy Comptroller for New York City, May 1, 1981

"This report analyzes the results of property tax administration in New York City. At present the City taxes different types of property at different effective tax rates —commercial property is taxed at a greater proportion of its true value than are one and two family homes and apartment dwellings. These disparities, however, which were declared illegal in the landmark *Hellerstein* decision, are not the focus of this study. (Although the practice was held to violate existing State statutes, it is within the power of the legislature to amend those statutes so as to permit a classification system where different property types are taxed at different effective tax rates.) Rather, this report focuses on disparities within similar types of properties. Within each such group we found that properties are assessed and hence taxed at different proportions of their full value. This practice is not only inequitable, but most experts agree that it may not carry out one of the basic constitutional guarantees, that of equal protection under the law.

"The report analyzes the extent of these disparities for the City's eight major property types* and estimates the extent of tax shifts that are necessary if all property *of the same type* is to be taxed equally, even if the total tax burden for the property type remains unchanged. In preparing our analysis, we reviewed sales and assessment

* Footnotes have been omitted.

data for some 125,000 parcels encompassing all major property types and areas of the City.

"Our review indicated that there are gross assessment inequities within each property type and neighborhood in the City. Within each of these groupings, assessments do not bear any rational relationship to the true value of the properties and to the value placed on other property of similar type. Thus, taxpayers have no assurance that their tax bills are fair. Furthermore, contrary to popular belief, such disparities are even greater among income producing properties than they are among one and two family houses."

Reports of City Refusal to Disclose Information Necessary for Obtaining Reduction of Assessed Valuation in Tax Certiorari Proceedings

New York Times, November 10, 1980, p. B 3, "City Won't Let Analysts See Real Estate Sales Data"

"New York City, facing numerous challenges that its real estate tax assessments are far below market values and discriminate among classes of property, has refused to make official real estate sales data available to analysts for the first time in five years of studies.

"The refusal follows reports by the Center for Local Tax Research of so-called 'effective tax rates.' In these, the center has calculated, for example, that in 1978, the city taxed residential property at $2.15 per $100 of averaged sales values.

"State law, as interpreted by the Court of Appeals in 1975 requires that real estate be assessed at full value. Since 1977, the city's official tax rate has been $8.75 per $100 of assessed valuation, and is due to rise to $8.95 on Jan. 1, 1981.

"Philip Finkelstein, director of the center and a former deputy city administrator, disclosed yesterday that the center's request for the city's aggregated 1979 data on sales had been turned down because the data was 'confidential.'

"Harry S. Tishelman, who just resigned as City Finance Commissioner to become district director in the Small Business Administration, explained the refusal by saying that sales records had been put on computer tapes that included tax returns filed when an owner sold property, and that this information must be kept secret.

"Mr. Tishelman said that the data were also sought by persons suing for tax refunds from the city based on claims of inequality in assessing classes of property, as well as individual property."

Excerpt from *City of Unequal Neighbors: A Study of Residential Property Tax Assessments in New York City*, p. 3 and Appendix B, New York Public Interest Research Group, 1981

"Roadblocks to Studying Property Taxes in New York City: The City Covers Up

"As of now, a New York City homeowner would find it an impossible job to determine the accuracy of his/her property tax assessment. NYPIRG was required to expend resources far beyond the capability of even the most tenacious taxpayer-activist in our exploration of the fairness of the City's property tax system.

"The City's response to our requests for information was one of consistent delay and evasion. This experience leads to one inescapable conclusion: The City believes that its administration of the property tax has become so oppressive it must prevent citizens from reviewing its performance. The City has evidently decided to cover up the mess.

"NYPIRG's difficulties in obtaining the necessary information from the City is detailed in Appendix B.

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"APPENDIX B

"NYPIRG was forced to launch an expensive, time-consuming six month campaign to obtain the basic information necessary to review residential property taxes. When we began the project, we were told that the first and most essential step was to acquire the City's "sales file," a listing of recent residential selling prices and assessments. Any other data sources concerning residential property values would have been incomplete, of uncertain reliability and far too costly to compile.

"In the past, the sales file had been made available routinely to property tax researchers. We were thus dismayed to learn that the City had changed its policy in the last year and was refusing to release the file to legitimate researchers. The City denied a request for the data made by us last July under the New York State Freedom of Information Law. (Public Officers Law Sections 84-90).

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"The City's position flew in the face of reason. For one thing, it had been the City's own policy to make the sales files available to *bona fide* researchers who committed themselves to respecting the privacy rights of homeowners listed in the file.

"In addition, both the assessment and the selling price of individually identifiable homes are on public file in borough offices of City agencies. (The staggering number of homes sold in a given year—over 25,000—rules out these documents as a data source for an assessment sales study.) Finally no promise of confidentiality is made to the seller or buyer on the Real Property Transfer Tax return forms. No expectations of privacy are created, and none could be

as selling prices for individual homes are a matter of public record in the City Clerk's offices where deeds are recorded.

"The City's concern for homeowners' confidentiality was an apparent fraud. The only possible aim could be to place roadblocks in the way of academic researchers and public interest groups wishing to evaluate the work of City officials in administering the property tax."

Partial List of New York City and State Legal Requirements and Restrictions on Multiple Dwelling Owners Since 1943 (Not Compensated by Any Rent Increases or Otherwise)

New York City Rent and Rehabilitation (Rent Control) Law

(Administrative Code of the City of New York § Y-51.1.0, *et seq.*)

(a) prevents any rent increases without specific approval of City;

(b) grants virtual lifetime tenancy to tenants and tenants' family including future family members without limit;

(c) requires substantial essential services to be provided;

(d) provides criminal penalties up to two years' imprisonment for violations; and

(e) permits indefinite lease renewals by tenants at no increase in rent.

Housing Maintenance Code, 1967

(Title D, Chapter 26, Administrative Code of the City of New York, added by Local Law 56)

Added new obligations of owner for:

(a) installation of central heating systems and maintenance of heat on a twenty-four hour a day basis;

(b) supplying of hot water to all dwelling units;

(c) installation of electric lights in all public halls and all rooms in dwelling units, and requirement of

exterior lights in all public courts, area, stairs, halls, etc. between sunset and sunrise; and

(d) provision of janitorial services and numerous other requirements.

Local Law 71, Enacted 1968

Imposed new obligations on owners to install, repair and replace all sidewalks (City-owned property) adjacent to building.

Multiple Dwelling Law

(Chapter 496, Laws 1970 (Sec. 50-a-[3]))

Requires immediate installation of automatic self-locking doors and intercom systems.

Public Health Law, Title X

(Chapter 338, Laws 1970)

Requires removal or covering of all lead paint in apartments and authorizes "receivership" of building to enforce compliance.

Local Law 8, Enacted 1971

Additional heavy-duty lock sets and other equipment required to be installed.

Local Law 17, Enacted 1973

Required installation of new fire doors and frames and related equipment in "old law" tenements.

Local Law 17, Enacted 1974

Repeal of provisions of "maximum base rent" laws that permitted labor cost "pass-alongs" to tenants.

Rent Stabilization Law

(Chapter 576, Laws 1974)

Repealed "vacancy decontrol" and made "decontrolled" apartments again subject to rent control.

Real Property Law

(Section 235-b, Chapter 597, Laws 1975)

Enacted "warranty of habitability" for all tenants, substantially increasing services required.

Real Property Law

(Section 226-b, Chapter 549, Laws 1975)

Restricted owners' right to prevent subleasing of apartments.

Local Law 83, Enacted 1979

Requires building owners to clean substantial portions of public streets and roadways.